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No. 427

In the Supreme Court of the United States

OCTOBER TERM, 1939

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ALFRED C. FULLER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 45–51) is unreported. The *per curiam* opinion of the Circuit Court of Appeals (R. 57) is reported in 105 F. (2d) 903.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 19, 1939. (R. 58.) The petition for a writ of certiorari was filed September 29, 1939, and was granted February 5, 1940. (R. 58.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether income paid to the taxpayer's divorced wife under the provisions of a trust which was created by him for her maintenance and support, pursuant to an agreement between them which was approved in the divorce decree, should be included in taxpayer's income.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 7–8.

STATEMENT

The facts as stipulated (R. 18–31) and found by the Board of Tax Appeals (R. 45–48) may be summarized as follows:

On July 25, 1930, taxpayer and his wife entered into an agreement in contemplation of divorce which provided among other things for the creation by taxpayer of a trust of certain stock to continue for ten years. During the life of the trust, the income was to be applied to the maintenance and support of the wife, and at the termination of the trust, the trust property was to be transferred to her outright. (R. 45–46.) The parties agreed to waive all claims against each other arising out of the marital relation. (R. 46.)

On November 12, 1930, taxpayer's wife obtained a divorce decree in Nevada. The decree expressly

approved the agreement of July 25, 1930. (R. 47.)

On December 22, 1930, taxpayer created the trust provided for in the agreement, and the income from the trust estate in 1931, 1932, and 1933 was disbursed for the benefit of taxpayer's wife in accordance with the terms of the agreement (R. 47).

Taxpayer did not include this income in his tax returns for the years in question (R. 47), but the Commissioner assessed deficiencies with respect thereto (R. 45, 7, 16). The decisions of the Board of Tax Appeals sustaining the action of the Commissioner were reversed by the court below.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In excluding from the gross income of taxpayer income paid to his divorced wife from a trust established by taxpayer for her maintenance and support pursuant to an agreement between them approved in the divorce decree.

2. In failing to hold taxpayer taxable under the doctrine of *Douglas* v. *Willcuts*, 296 U. S. 1, upon that income, as income paid out to his wife under a trust created by him to discharge his legal obligation to support her.

3. In holding that the doctrine of *Douglas* v. *Willcuts* is inapplicable unless by state law the divorce court retains power to change its original alimony award.

4. In failing to affirm the decisions of the Board of Tax Appeals and in reversing the "order"[1] of that Board.

ARGUMENT

THE TRUST INCOME IS TAXABLE TO THE HUSBAND UNDER THE DOCTRINE OF *DOUGLAS V. WILLCUTS*

This case presents the question whether it is essential, in order for the income from an "alimony trust" to be taxable to the husband under *Douglas* v. *Willcuts*, 296 U. S. 1, that the divorce court retain the power to modify the provision for the support of the wife after the entry of its final decree. Our position here is the same as our first point in *Helvering* v. *Leonard*, No. 426, present Term, where we contend that if there is a legal obligation under the applicable state law to support the wife after she has obtained a divorce, and the income from a trust is devoted to the discharge of that obligation, then the amount of trust income payable to the wife is taxable to the husband whether or not the divorce court has jurisdiction to change the provisions of its decree relating to the maintenance of the wife, or whether or not the wife has any recourse against the husband beyond the terms of the trust. Reference is made to our brief

[1] Although the judgment of the court below refers to the "order" of the Board of Tax Appeals, the petition for review herein (R. 52–54) related to two decisions of the Board, one covering the years 1931 and 1932 (R. 51) and the other the year 1933 (R. 51–52).

in the *Leonard* case (pp. 7–20), for the argument in support of that position.

However, since the *Leonard* case involves the law of the State of New York, whereas in the instant case the divorce was obtained in Nevada, it is pertinent to point out, in order to render applicable here the argument in our brief in the *Leonard* case, that in Nevada, as in New York, the husband's obligation to support the wife continues after she has obtained an absolute divorce. *Lake* v. *Bender,* 18 Nev. 361, 402–403; *Greinstein* v. *Greinstein,* 44 Nev. 174, 177–178; Sections 9463, 9465 of Nevada Compiled Laws, 1929, Vol. 4. And the divorce court will accept the agreement of the parties only if it considers its provisions entirely satisfactory. *Lewis* v. *Lewis,* 53 Nev. 398.

Although the wife obtained her divorce in Nevada, it is stipulated that the taxpayer, at all times material to this proceeding, resided in Connecticut (R. 18), and the agreement between the parties was executed in that state (R. 24). But even if the law of Connecticut applies, the husband is likewise under a legal obligation to support his wife. *Cary* v. *Cary,* 112 Conn. 256, 259; *Wright* v. *Wright,* 93 Conn. 296, 300. Thus, whether the husband's duty to his wife is properly to be determined with reference to the law of Connecticut or of Nevada, the trust income in question was used to discharge the legal obligation of support, and is

therefore taxable to the husband under *Douglas* v. *Willcuts*.[2]

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted.

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MARCH 1940.

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[2] It may even be that, notwithstanding the absence of any residual power in the Nevada court to grant additional alimony beyond the terms of the trust once it has been approved, some other court, such as a Connecticut court, may have power so to do. Cf. *Mallina* v. *Mallina*, 167 Misc. 343, 4 N. Y. Supp. (2d) 27; 40 Col. L. Rev. 131.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * * *

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 83. *Gifts and bequests.*—Property received as a gift, or received under a will or under statutes of descent and distribution, is exempt from the income tax, although the income therefrom derived from investment, sale, or otherwise is not. An amount of principal paid under a marriage settlement is a gift. Neither alimony nor an allowance based on a separation agree-

ment is taxable income. (See article 281.)

ART. 281. *Personal and family expenses.*— * * * Alimony and an allowance paid under a separation agreement are not deductible from gross income. (See article 83.) * * *

The above-quoted provisions of the law and regulations are the same as the corresponding provisions of the Revenue Act of 1932, c. 209, 47 Stat. 169, and the regulations appertaining thereto (Sections 22 and 24; Regulations 77, Articles 83 and 281).

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